

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CAYUGA MEDICAL CENTER
AT ITHACA, INC.**

and

Cases 03-CA-156375
03-CA-159354
03-CA-162848
03-CA-165167
03-CA-167194

1199 SEIU UNITED HEALTHCARE WORKERS EAST

**GENERAL COUNSEL'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

Counsel for the General Counsel (General Counsel) respectfully submits this Response to the Notice to Show Cause issued by the National Labor Relations Board (Board) on October 15, 2018. For the reasons enumerated below, the General Counsel requests that rules 1, 4, and 6 as plead in paragraph VI of the Consolidated Complaint and Notice of Hearing be remanded to the Administrative Law Judge for further proceedings consistent with the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017). The remaining rules at issue are prima facie lawful under *Boeing* and the General Counsel respectfully requests that the Board dismiss those allegations.

I. Procedural Background

1199 SEIU United Healthcare Workers East (the Union) filed charges alleging, in part, that Cayuga Medical Center at Ithaca, Inc. (Respondent) violated Section 8(a)(1) of the Act by maintaining certain unlawful rules. An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on February 26, 2016. A hearing was held on May 2-6, and 24, 2016 in

Ithaca, New York before Administrative Law Judge David I. Goldman. ALJ Goldman rendered his decision on October 28, 2016 in JD-104-16, finding that some, but not all, of the alleged rules were unlawful.

On November 25, 2016, Respondent filed Exceptions to the ALJD. On December 9, 2016, Counsel for the General Counsel filed an answering brief, along with Cross-Exceptions to the ALJD and a Brief in Support of Cross-Exceptions. On December 16, 2017, the Board issued a decision, 365 NLRB No. 170, ruling on the exceptions to several complaint allegations but severing and retaining for future resolution the complaint allegations involving Respondent's maintenance of certain unlawful rules. The severed allegations alleged that Respondent violated Section 8(a)(1) of the Act based on the analytical framework set forth in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). Recently, the Board issued its decision in *The Boeing Company*, overruling the “reasonably construe” test in *Lutheran Heritage Village – Livonia* and announced a new standard that applies retroactively to all pending cases. *Boeing*, supra. The instant Notice to Show Cause issued on October 15, 2018.

II. The Board Should Remand Rules 1, 4, and 6 to the ALJ for Further Processing

The General Counsel excepted to the ALJ's dismissal of the “Clinical Excellence” rule (rule 1 in Complaint paragraph VI) under *Lutheran Heritage Village – Livonia*, which states:

Clinical Excellence

Respects confidentiality and privacy at all times, including co-workers, adhering to the Social Networking Policy.

The General Counsel does not oppose the remand to the ALJ of this work rule for further processing consistent with the decision in *Boeing*. Under *Boeing*, a work rule warrants individualized scrutiny to determine whether the rule as reasonably interpreted would prohibit or interfere with the exercise of NLRA rights, and if so, to determine whether any adverse impact

on NLRA-protected conduct is outweighed by legitimate justifications. The Clinical Excellence rule requires this individualized scrutiny as it could reasonably be interpreted to prohibit employees from discussing wages, hours, and other terms and conditions of employment with one another or with nonemployees. The General Counsel submits that the negative impact of this rule on employees' Section 7 activity is apparent. Alternatively, the negative impact would outweigh any business justification Respondent might advance in support of maintaining it. Therefore, the General Counsel does not oppose the remand of this rule to the ALJ.

Respondent excepted to ALJ Goldman's decision that its "People" rule (rule 4 in Complaint paragraph VI) would reasonably be interpreted by employees to chill their Section 7 rights. The rule reads:

People

Utilizes proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation.

The General Counsel does not oppose the remand of this rule to the ALJ. The requirement that employees utilize "proper channels" to express dissatisfaction with either Respondent's policies or the actions of supervisors or administrators would reasonably be construed to prohibit employees from utilizing channels of communication outside the direct employee-employer relationship, such as communicating with the press, the government, or even one another. Such a prohibition would curtail employees in their exercise of rights protected by Section 7 of the Act. Under *Boeing*, Respondent would need to show a legitimate business justification serious enough to outweigh it. The General Counsel does not oppose the remand of this rule to the ALJ for further processing consistent with *Boeing*.

Respondent excepted to ALJ Goldman's decision that its second "Community" rule (rule 6 in Complaint paragraph VI) was unlawfully overbroad. The rule reads:

Community

Inappropriate and disruptive communications/behaviors include but are not limited to:

Criticizes co-workers or other staff in the presence of others in the workplace or in the presence of patients.

As the ALJ noted, “a flat ban on criticizing coworkers or management in the presence of others would reasonably – indeed, one could say, unavoidably – be read as striking at the essence of the Act and its protections.” 365 NLRB slip op. at *11. The rule requires the individualized scrutiny of a category 2 rule under *Boeing*. The General Counsel does not oppose the remand of this rule to the ALJ for further processing consistent with *Boeing*.

III. The Board Should Dismiss Rules 2, 3, and 5 Pursuant to *Boeing*

The General Counsel excepted to the ALJ’s determination that Respondent’s two “Customer Service” rules (rules 2 and 3 in Complaint paragraph VI) were lawful under *Lutheran Heritage Village – Livonia*. The rules read:

Customer Service

Interacts with others in a considerate, patient and courteous manner.

Customer Service

Is honest, truthful, and respectful at all times.

Respondent excepted to the ALJ’s determination that Respondent’s first “Community” rule (rule 5 in Complaint paragraph VI) was unlawful. The rule reads:

Community

Inappropriate and disruptive communications/behaviors include but are not limited to:

Displays behavior that would be considered by others to be intimidating, disrespectful or dismissive.

The General Counsel requests that the Board dismiss these three work rule allegations. Under *Boeing*, these rules are prima facie lawful category 1 rules. None of the rules would prohibit or interfere with the exercise of employees’ rights under Section 7 of the Act, and to the

extent any of them would do so, any potential adverse impact on protected rights would be outweighed by the legitimate business justifications associated with the rules. To remand these rules to the ALJ would expend unnecessary time and resources. In lieu of remanding the rules for further consideration by the ALJ, the General Counsel requests that the Board dismiss the portion of Complaint paragraph VI which alleges rules 2, 3, and 5 to be unlawful.

IV. Conclusion

For the reasons stated above, the General Counsel does not oppose the remand of rules 1, 4, and 6 as listed in Complaint paragraph VI to the ALJ for further processing consistent with the Board's decision in *Boeing*. Further, the General Counsel respectfully requests that the Board dismiss the portion of Complaint paragraph VI alleging that rules 2, 3, and 5 to be unlawful.

DATED at Albany, New York this 29th day of October, 2018.

Respectfully submitted,

/s/ Alicia E. Pender

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